

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

SAMISONI TAUKITOKU,

Petitioner,

v.

WARDEN FILSON, et al.,

Respondents.

Case No. 3:16-cv-00762-HDM-CSD

**ORDER**

This habeas matter is before the Court on Respondents' Motion for Partial Reconsideration, or in the Alternative, Motion for Clarification (ECF No. 64). Petitioner Samisoni Taukitoku filed his Opposition (ECF No. 65). Also before the Court is Respondents' Motion to Suspend Briefing (ECF No. 66), Petitioner's Opposition (ECF No. 67), and Respondents' Reply (ECF No. 68).

**Background**

The Court granted Taukitoku's first motion for discovery and instructed the Washoe County District Attorney's Office to provide all materials previously disclosed to defense before and during Taukitoku's trial. (ECF No. 25.) After receiving the materials provided as a result of the order granting discovery, counsel conducted its own investigation for the instant habeas case. Counsel located and obtained declarations from several eyewitnesses who claim they saw persons other than Taukitoku fire shots during the fights. (Exs. 5-10; ECF No. 33.)

Taukitoku filed a third motion for discovery seeking the release of the State's ballistics expert, Kevin Lattyak's ("Lattyak") bench notes and photographs, on which he based his

1 report, as well as physical evidence, for review by an independent  
2 expert. (ECF No. 32.) The Court denied his motion without prejudice  
3 finding that Taukitoku should first pursue his unexhausted claims  
4 and their related discovery in state court. (ECF No. 41.) The Court  
5 then granted Taukitoku's motion for stay and abeyance pending  
6 exhaustion of his unexhausted claims. (ECF No. 44.) The state court  
7 dismissed his state habeas petition finding his claims  
8 procedurally barred.<sup>1</sup> (Ex. 44; ECF No. 47-22.) Taukitoku appealed  
9 and the Nevada Supreme Court affirmed. (Ex. 49; ECF No. 47-26.)

10 The Court granted Taukitoku's motion to reopen and Taukitoku  
11 filed his second amended petition. (ECF Nos. 49, 50.) Taukitoku  
12 filed a fourth motion for discovery again seeking the release of  
13 Lattyak's bench notes and photographs as well as release of  
14 physical evidence, including 2 firearms, 10 projectiles, 16  
15 casings, and 1 fragment recovered for examination at Forensic  
16 Analytical Crime Lab. (ECF No. 51.) The Court granted Taukitoku's  
17 motion for discovery. (ECF No. 62.) The Court, however, based on  
18 Respondents' concerns regarding potential jeopardization of chain  
19 of custody for physical materials, instructed the parties to meet  
20 and confer and prepare for the Court a proposed order permitting  
21 discovery that will assure that a proper chain of custody will be  
22 maintained, and that the integrity of the evidence will be  
23 maintained and that sufficient safeguards shall be in place to  
24 eliminate any possibility of tampering with or alteration or  
25 destruction of the release of physical evidence. (*Id.* at 9.)

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27 <sup>1</sup> Taukitoku's requests for an evidentiary hearing in state court  
28 were denied. (ECF No. 51 at 11.)

## Discussion

### **I. Motion for Partial Reconsideration, or in the Alternative, Motion for Clarification**

Respondents acknowledge that they are not challenging the Court's order granting discovery. (ECF No. 64 at 3.) Respondents, however, provide that the Washoe County District Attorney and the Washoe County Sheriff's department control the physical evidence at issue and that Respondents do not have a client relationship with such agencies; nor do they have independent authority regarding the production of evidence for such agencies. (*Id.*) Respondents further express concern that a potential meet and confer with Taukitoku may "[blur] the lines between independent agencies and [conflate] the role of the 'state' with that counsel for the Warden." (*Id.* at 4.) Respondents assert that Rule 45 of the Federal Rules of Civil Procedure allows a third-party to object to a subpoena and that they have to be given an opportunity to reach an agreement about the method of transferring property. (*Id.*) Respondents request the Court to alter or amend its order to allow "the third parties having control of the evidence to work with Petitioner's counsel in drafting the necessary orders to allow the release of the evidence for testing by Petitioner's expert." (*Id.* at 4.)

In response, Taukitoku asserts that counsel has gathered further information regarding the physical evidence at issue and the chain of custody protocol of the independent examiner. (ECF No. 65 at 2-3.) The physical evidence has been released to the Reno Police Department ("RPD"). The independent examiner, Forensic Analytical Crime Lab, has established chain of custody protocols

1 and, in addition, the physical evidence can be shipped directly to  
2 the independent examiner with a tracking number serving to maintain  
3 chain of custody. (*Id.*) Upon confirmation of control of the  
4 physical evidence, the Evidence Supervisor at the RPD agreed that  
5 the physical evidence can be shipped to the independent examiner  
6 and "expressed no other concerns about maintaining chain of  
7 custody." (*Id.* at 3.) Taukitoku requests that the Court order or  
8 authorize a subpoena for the Reno Police Department to release the  
9 2 firearms, 10 projectiles, 16 casings, and 1 fragment recovered  
10 in connect with this case for examination at Forensic Analytical  
11 Crime Lab. (*Id.* at 4.)

12 The Court agrees with Taukitoku's assertion that it is not  
13 necessary for him at this juncture to further address chain of  
14 custody with "third parties." (*Id.* at 3.) Entities that are served  
15 with subpoenas may raise objections to such subpoenas and Taukitoku  
16 represents that he does not anticipate objections from the RPD at  
17 this time. (*Id.*) Accordingly, the Court denies Respondents' motion  
18 for partial reconsideration to the extent that they request  
19 Taukitoku work further with third parties having control of the  
20 evidence in drafting a subpoena to release the physical evidence.  
21 Taukitoku may proceed with issuing a subpoena for the Reno Police  
22 Department to release the 2 firearms, 10 projectiles, 16 casings,  
23 and 1 fragment recovered in connection with this case for  
24 examination at Forensic Analytical Crime Lab upon the  
25 representation that the evidence will be sent directly to the lab  
26 via certified mail, FedEx, or UPS with all standard chain of  
27 custody protocols to be followed.

## II. Motion to Suspend Briefing

Respondents request that the Court suspend briefing until the completion of discovery. (ECF No. 66.) They assert that the availability of procedural defenses and their merits analysis may change depending on the outcome of discovery. (*Id.* at 2.) Taukitoku argues that discovery results would only further support his claims and cause and prejudice argument to overcome anticipated procedural defenses. (ECF No. 67 at 4.) He asserts that a suspension of briefing would cause unnecessary delay and anticipates that retesting and analysis of the physical evidence to take approximately one month. (*Id.* at 3-4.) Taukitoku, however, has no objection to an extension of time to file a response to his second amended petition. (*Id.* at 5.)

In their reply, Respondents, in the alternative, request a 90-day extension of time to file a response to Taukitoku's second amended petition. (ECF No. 68 at 1.) Respondents assert that any procedural default defense will likely be met with a cause and prejudice argument, including the application of *Martinez v. Ryan*, 566 U.S. 1 (2012), requiring a merits analysis of the claims that Petitioner is developing through discovery. (*Id.* at 2.)

The Court denies Respondents' request to suspend briefing. The Court, however, finds good cause to grant Respondents' request to extend time to file their response to the second amended petition. Respondents have until September 23, 2022, to file their response to Taukitoku's second amended petition.

### IT IS THEREFORE ORDERED:

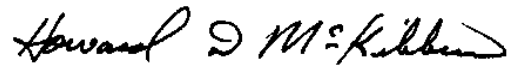
1. Respondents' Motion for Partial Reconsideration, or in the Alternative, Motion for Clarification (ECF No. 64) is

1 DENIED to the extent that they request Taukitoku to work  
2 further with third parties having control of the evidence  
3 in drafting a subpoena to release the physical evidence.

4 2. Taukitoku may proceed with issuing a subpoena to the Reno  
5 Police Department to release the 2 firearms, 10  
6 projectiles, 16 casings, and 1 fragment recovered in  
7 connection with this case for examination at Forensic  
8 Analytical Crime Lab upon the representation that the  
9 evidence will be sent directly to the lab via certified  
10 mail, FedEx, or UPS with all standard chain of custody  
11 protocols to be followed.

12 3. Respondents' Motion to Suspend Briefing (ECF No. 66) is  
13 DENIED. Respondents' request to extend, in the alternative,  
14 is GRANTED. Respondents have until September 23, 2022, to  
15 file their response to Taukitoku's second amended petition.

16 DATED: this 6th day of July, 2022.

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19 HOWARD D. MCKIBBEN  
20 UNITED STATES DISTRICT JUDGE  
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